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NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. AZ-15-1013-JuKiPa
)
IVAYLO TSVETANOV DODEV,) Bk. No. 2:14-bk-02116-MCW
)
Debtor.)

IVAYLO TSVETANOV DODEV,
Appellant,

v.

M E M O R A N D U M *

THE BANK OF NEW YORK MELLON)
FKA THE BANK OF NEW YORK AS)
TRUSTEE FOR THE CERTIFICATE-)
HOLDERS OF CWALT, INC.,)
ALTERNATIVE LOAN TRUST 2007-)
OA7, MORTGAGE PASS-THROUGH)
CERTIFICATES, SERIES 2007-OA7)
by and through its servicing)
agent Select Portfolio)
Servicing, Inc.)

Appellee.

Submitted Without Oral Argument on June 19, 2015
at Phoenix, Arizona

Filed - July 2, 2015

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Madeleine C. Wanslee, Bankruptcy Judge, Presiding

Appearances: Ivaylo T. Dodev on brief pro se; Renee M. Parker

* This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8024-1.

1 of Wright Finlay & Zak LLP on brief for appellee
2 The Bank of New York Mellon fka The Bank of New
3 York as Trustee for the Certificate-holders of
4 CWALT, Inc., Alternative Loan Trust 2007-OA7,
Mortgage Pass-Through Certificates, Series 2007-
OA7 by and through its serving agent Select
Portfolio Servicing, Inc.

5
6 Before: JURY, KIRSCHER, and PAPPAS, Bankruptcy Judges.

7
8 After Ivaylo Tsvetanov Dodev (Debtor) filed his chapter 11¹
9 petition, The Bank of New York Mellon (BNYM) fka The Bank of New
10 York as Trustee for the Certificate-holders of CWALT, Inc.,
11 Alternative Loan Trust 2007-OA7, Mortgage Pass-Through
12 Certificates, Series 2007-OA7, by and through its servicing
13 agent Select Portfolio Servicing, Inc. (SPS), filed a proof of
14 claim (POC) asserting a secured claim in the amount of
15 \$887,726.66 against Debtor's residential real property and
16 listing prepetition arrears of \$227,413.43.

17 Debtor objected to the POC arguing, among other things,
18 that neither BNYM nor SPS had standing to file the POC or
19 enforce the underlying note. The bankruptcy court overruled
20 Debtor's objection on the grounds that: (1) BNYM's POC was prima
21 facie evidence of the validity and amount of the claim;
22 (2) Debtor failed to advance any argument to overcome the
23 claim's prima facie validity; (3) the validity or extent of
24 BNYM's lien could not be litigated in the context of the claim

25
26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure and "Civil Rule" references are the Federal Rules of
Civil Procedure.

1 objection; and (4) Debtor confirmed that the validity of the
2 lien and the standing issues were currently being litigated in a
3 civil action pending in the United States District Court for the
4 District of Arizona (Civil Action). The bankruptcy court
5 overruled Debtor's objection to the POC, and Debtor appealed.
6 For the reasons set forth below, we DISMISS this appeal as moot.

7 **I. FACTS²**

8 **A. Prepetition Events**

9 On July 16, 2004, Debtor and his non-debtor spouse³
10 acquired an interest in real property located in Gilbert,
11 Arizona (Property). About two years later, Debtor obtained a
12 loan from First Magnus Financial Corporation (First Magnus) in
13 the amount of \$681,750 which was evidenced by a promissory note
14 and secured by a deed of trust against the Property. After loan
15 inception, First Magnus transferred the note to Countrywide Bank
16 NA, which in turn transferred the note to Countrywide Home Loans
17 Incorporated, and Countrywide Home Loans Incorporated endorsed
18 the note in blank. BNYM asserts that it has possession of the
19 note. Through a Corporation Assignment of Deed of Trust
20 Arizona, Mortgage Electronic Registration Systems, Inc. (MERS)
21 assigned all beneficial interest in the deed of trust and the

22
23 ² We take judicial notice of various pleadings which were
24 docketed and imaged by the bankruptcy court in this bankruptcy
25 case and also take judicial notice of various pleadings which
26 were docketed and imaged in the United States District Court for
the District of Arizona Case No. CV-13-02155-PHX-DLR. Atwood v.
Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9
(9th Cir. BAP 2003).

27
28 ³ The non-debtor spouse later executed a quitclaim deed for
the Property in favor of Debtor on December 13, 2006.

1 note, including the right to monies due under the note, to BNYM.
2 BNYM subsequently executed a document entitled Substitution of
3 Trustee Arizona, substituting Recontrust Company, N.A., in the
4 place of the original trustee under the deed of trust.

5 Debtor defaulted on the loan on November 1, 2008. As a
6 result, BNYM instituted foreclosure proceedings against the
7 Property. On January 5, 2009, Debtor filed a chapter 7 petition
8 that stayed the foreclosure proceedings. On April 23, 2009,
9 Debtor received his § 727 discharge.⁴

10 On August 2, 2013, a Notice of Trustee's Sale Arizona with
11 a sale date of November 8, 2013, was recorded against the
12 Property in the Official Records for the County of Maricopa.

13 In response to the notice of sale, on October 23, 2013,
14 Debtor commenced the Civil Action against BNYM, SPS, and others
15 in the United States District Court for the District of Arizona
16 (Case No. CV-13-02155-PHX), seeking to quiet title and alleging
17 damages under the Fair Debt Collection Practices Act (FDCPA),
18 Breach of Contract, and RICO. Prior to his bankruptcy filing,
19 Debtor filed a first amended complaint. BNYM, SPS and others
20 filed motions to dismiss under Civil Rule 12(b)(6). Debtor
21 replied and the moving parties filed a response.

22 **B. Postpetition Events**

23 Meanwhile, on February 21, 2014, Debtor filed a chapter 11
24 petition. On April 21, 2014, Debtor filed a notice in the Civil
25 Action that he had filed a bankruptcy petition. On April 22,

26
27 ⁴ Debtor later asserted in the claim objection that his
28 chapter 7 discharge relieved him of all obligations under the
note.

1 2014, the district court entered an order staying the Civil
2 Action for six months and denying the pending motions to dismiss
3 without prejudice.

4 Debtor continued his efforts challenging BNYM's secured
5 claim against his Property in the bankruptcy court. In
6 Schedule A, Debtor listed the Property with a value of \$293,000
7 and listed the amount of the secured claim as zero. In
8 Schedule D, Debtor listed First Magnus as holding a secured
9 claim against the Property in the amount of zero. Debtor listed
10 himself as a creditor in Schedule D holding a secured claim of
11 \$1,053,160 against the Property and an unsecured claim in the
12 amount of \$760,160. Finally, in Schedule F, Debtor listed BNYM
13 as an unsecured creditor with a claim valued at zero. In an
14 amended Schedule F, Debtor later asserted that BNYM had an
15 unsecured claim in the amount of \$681,750.

16 On June 12, 2014, BNYM filed a motion for relief from the
17 automatic stay so that it could continue to foreclose on the
18 Property. In the same motion, BNYM also requested an order
19 determining that the stay did not apply to the Civil Action that
20 was initiated by Debtor or, alternatively, for an order lifting
21 the stay to allow BNYM to proceed with the litigation. BNYM
22 argued that relief from the stay was warranted because Debtor
23 had no equity in the Property and that judicial efficiency
24 favored lifting the stay to allow the Civil Action to continue.
25 According to BNYM, the district court case had been ongoing for
26 close to eight months and during that time the parties had fully
27 briefed the motions to dismiss. Debtor opposed the relief from
28 the stay motion on various grounds, including BNYM's lack of

1 standing.

2 On July 8, 2014, SPS timely filed POC No. 2-1 on behalf of
3 BNYM, alleging a secured claim in the amount of \$887,726.66 and
4 stating that the amount of the arrears as of the petition date
5 was \$227,413.45. The POC listed SPS as the entity to receive
6 notice and payment on the claim. Attached to the POC was an
7 itemization of all prepetition fees and charges and the amount
8 necessary to cure the prepetition default. Also attached was a
9 copy of the note which contained three endorsements: (1) from
10 First Magnus, the loan originator, to Countrywide Bank NA;
11 (2) from Countrywide Bank NA to Countrywide Home Loans
12 Incorporated; and (3) a blank endorsement from Countrywide Home
13 Loans Incorporated without recourse. The POC also attached a
14 copy of the deed of trust, an assignment of the deed of trust
15 from MERS to BNYM, and proof that the deed of trust was recorded
16 prepetition. The POC was signed by the attorney for BNYM.

17 Debtor objected to BNYM's POC, asserting, among other
18 things, that neither BNYM nor its servicing agent, SPS, had
19 standing to file the POC or enforce the lien.

20 BNYM asserted several arguments in response. First,
21 Debtor did not provide a specific basis under § 502 to have
22 BNYM's POC disallowed. Second, if the objection to the POC was
23 sustained, BNYM would not be permitted to participate in the
24 chapter 11 plan, but its lien would pass through the bankruptcy
25 unaffected. Next, BNYM maintained that it was holder of the
26 note since it was endorsed in blank and BNYM was either in
27 possession or constructive possession of the promissory note.
28 Therefore, BNYM qualified as the holder of the note and was

1 entitled to enforce the note under Ariz. Rev. Stat. (ARS)
2 § 47-3301.⁵ Fourth, BNYM asserted that as the beneficiary under
3 the deed of trust, it was entitled to enforce the underlying
4 obligation. Finally, BNYM argued that it had both
5 constitutional and prudential standing and its POC complied with
6 all the applicable bankruptcy rules.

7 On August 27, 2014, the district court terminated the stay
8 that it had imposed on the Civil Action and reinstated the
9 parties' motions to dismiss Debtor's first amended complaint.⁶

10 On September 10, 2014, the bankruptcy court held a
11 preliminary hearing on BNYM's motion for relief from the stay.
12 The court directed the attorney for BNYM to file a declaration
13 from his client setting forth the transfers of the loan and
14 attaching the relevant documentation.⁷ The court also
15 authorized the attorney to upload a form of order lifting the
16 automatic stay and the court stated that the stay would be

18 ⁵ ARS § 47-3301 provides:

19 'Person entitled to enforce' an instrument means the
20 holder of the instrument, a nonholder in possession of
21 the instrument who has the rights of a holder or a
22 person not in possession of the instrument who is
23 entitled to enforce the instrument pursuant to
24 § 47-3309 or § 47-3418, subsection D. A person may be
25 a person entitled to enforce the instrument even though
26 the person is not the owner of the instrument or is in
27 wrongful possession of the instrument.

28 ⁶ Evidently the parties stipulated that the automatic stay
under § 362 did not apply to the litigation commenced by Debtor
prior to his bankruptcy.

⁷ The declaration was not filed until October 29, 2014,
after the bankruptcy court ruled on the claim objection.

1 lifted.

2 On October 6, 2014, the district court granted BNYM's and
3 SPS's motions to dismiss Debtor's first amended complaint in the
4 Civil Action without prejudice, except as to his claim for mail
5 fraud which was dismissed with prejudice. The district court
6 gave Debtor fifteen days in which to file a second amended
7 complaint.⁸

8 Meanwhile, the bankruptcy court heard Debtor's objection to
9 BNYM's POC on October 20, 2014. The bankruptcy court advised
10 Debtor to keep in mind that his objection to BNYM's POC would
11 not remove or invalidate the lien against his Property in the
12 context of the claim objection.⁹ Debtor also confirmed to the
13 court that he was seeking that relief in the Civil Action.

14 Debtor argued that, for myriad reasons, BNYM and SPS did
15 not have standing to file the POC or enforce the note. In
16 response, Bank's counsel explained that SPS was subservicing the
17 loan and that SPS indicated to his firm that it was in
18 possession of the note and that note was endorsed in blank.
19 The bankruptcy court noted that BNYM had not yet filed an
20 affidavit or declaration in connection with its motion for
21 relief from stay. BNYM's counsel represented that the
22 declaration had been drafted and that he would file it sometime

24
25 ⁸ BNYM states in its brief that the district court granted
26 the motions to dismiss on December 12, 2013. However, the order
is dated October 6, 2014.

27 ⁹ Debtor did not file an adversary proceeding under
28 Rule 7001(2) in order to have the bankruptcy court determine the
validity, priority, and enforceability of BNYM's lien.

1 that week.¹⁰

2 The bankruptcy court ruled that BNYM's POC was prima facie
3 evidence of the validity of its claim and complied with the
4 applicable bankruptcy rules. The court found that Debtor had
5 not met his burden of proof of overcoming the prima facie
6 validity of the POC because his arguments failed to raise a
7 legal basis to sustain the objection or were inapplicable. The
8 court further found that BNYM had presented the note which
9 showed an endorsement in blank. The court stated that it did
10 not see any information from Debtor to show that the deed of
11 trust was invalidated or discharged or somehow removed from the
12 property in question. In the end, the bankruptcy court found
13 that "[t]he notes and deed[] of trust appear proper[] and
14 there's no basis on which to sustain your objection."

15 The bankruptcy court entered the order overruling Debtor's
16 objection and allowing Bank's claim on October 23, 2014.
17 Debtor filed a timely appeal from that order.¹¹

18 On October 23, 2014, the same day the bankruptcy court
19 entered the order overruling his claim objection, Debtor filed

20
21 ¹⁰ As previously noted, the declaration was filed on
22 October 29, 2014, after the bankruptcy court ruled on the claim
23 objection, and in connection with BNYM's motion for relief from
stay. In the declaration, an employee of SPS verified that SPS
was BNYM's servicer and had actual possession of the note.

24 ¹¹ Debtor also appealed a second order as part of his notice
25 of appeal - the bankruptcy court's order terminating the
26 automatic stay as to BNYM and determining that the automatic stay
27 did not apply to the Civil Action. The Panel issued an order
28 informing Debtor that it opened a second appeal, BAP No. 14-1529,
and requiring him to pay an additional filing and docketing fee,
which he did. That appeal has since been dismissed as moot
because Debtor's underlying bankruptcy case was dismissed.

1 his second amended complaint in the Civil Action. Debtor's
2 first claim for relief challenged the standing of "all
3 defendants", including BNYM and SPS. Debtor alleged that none
4 of the defendants had either constitutional or prudential
5 standing and that they were not the real parties in interest as
6 a holder in due course or authorized agent of a holder in due
7 course. Therefore, Debtor alleged that they could not show
8 injury in fact as a result. BNYM, SPS, and others again filed
9 motions to dismiss Debtor's second amended complaint.

10 On November 10, 2014, the bankruptcy court entered the
11 order granting BNYM's motion for relief from stay and
12 determining that the automatic stay did not apply to the Civil
13 Action.

14 On March 13, 2015, Debtor's bankruptcy case was dismissed.

15 On April 13, 2015, the district court granted the parties'
16 motions to dismiss Debtor's second amended complaint on all
17 causes of action with prejudice except the quiet title claim for
18 relief. The district court determined that Debtor's allegations
19 under his first claim for relief that included his standing
20 arguments failed to state a claim for relief and that further
21 amendment would be futile. The district court gave Debtor a
22 final opportunity to file a third amended complaint on the quiet
23 title claim. The order dismissing the other claims made clear
24 that Debtor was prohibited from reasserting any allegations
25 regarding BNYM's or SPS's standing in the third amended
26 complaint. The Civil Action remains open and is ongoing.

27 **II. JURISDICTION**

28 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.

1 §§ 1334 and 157(b)(2)(B). During the pendency of this appeal,
2 the bankruptcy court dismissed Debtor's chapter 11 case and
3 Debtor continued to assert his standing arguments in the Civil
4 Action through the filing of his second amended complaint. His
5 constitutional and prudential standing arguments ran their
6 course along with his other arguments relating to the FDCPA and
7 challenges to the validity of the assignment of the deed of
8 trust from MERS to BNYM when the district court dismissed those
9 claims, among others, with prejudice. Because of the dismissal
10 of the underlying bankruptcy case, and the presence of the
11 related litigation in the district court, the question arises
12 whether this appeal is moot. For the reasons set forth below,
13 we conclude that it is.

14 **III. ISSUES**

15 Do we have jurisdiction over this appeal?

16 If we do have jurisdiction over the appeal, did the
17 bankruptcy court err in overruling Debtor's objections to BNYM's
18 POC?

19 **IV. STANDARDS OF REVIEW**

20 Our jurisdiction, such as whether an appeal is moot, is a
21 question of law that we address de novo. Menk v. Lapaglia
22 (In re Menk), 241 B.R. 896, 903 (9th Cir. BAP 1999).

23 Standing is an issue of law which we also review de novo.
24 Palmdale Hills Prop., LLC v. Lehman Commercial Paper, Inc
25 (In re Palmdale Hills Prop., LLC), 654 F.3d 868, 873 (9th Cir.
26 2011). Factual determinations underlying the standing decision
27 are reviewed for clear error. Id.

28 An order overruling a claim objection can raise legal

1 issues (such as the proper construction of statutes and rules)
2 which we review de novo, as well as factual issues (such as
3 whether the facts establish compliance with particular statutes
4 or rules), which we review for clear error. Veal v. Am. Home
5 Mortg. Servicing, Inc. (In re Veal), 450 B.R. 897, 918 (9th Cir.
6 BAP 2011).

7 **V. DISCUSSION**

8 Debtor argues on appeal that the bankruptcy court erred in
9 overruling his objection for numerous reasons which we summarize
10 here: (1) SPS did not have standing to file the POC on behalf
11 of BNYM; (2) SPS failed to establish an agency relationship with
12 BNYM; (3) BNYM had not produced evidence that SPS was in
13 possession of the note until after his claim objection had been
14 ruled upon; (4) BNYM is in violation of the FDCPA; (5) the
15 validity of the endorsements on the copy of the note is
16 questionable; (6) BNYM has failed to establish that it had a
17 secured claim; (7) the assignment of the deed of trust from MERS
18 to BNYM was deficient; (8) the claim was unenforceable under
19 non-bankruptcy law; (9) the bankruptcy court failed to hold an
20 evidentiary hearing; and (10) the debt is time-barred by ARS
21 § 12-548.

22 While BNYM responds to these arguments, as an initial
23 matter, it asserts that this appeal is moot because the
24 bankruptcy court dismissed Debtor's chapter 11 case after he
25 filed this appeal and the order dismissing the case is now
26 final. Accordingly, we first consider our jurisdiction.

27 Ordinarily we have jurisdiction over appeals of final
28

1 orders under 28 U.S.C. § 158 but we lack jurisdiction to hear a
2 moot appeal. I.R.S. v. Pattullo (In re Pattullo), 271 F.3d 898,
3 901 (9th Cir. 2001). "Our mootness inquiry focuses upon whether
4 we can still grant relief between the parties." Id. "'If an
5 event occurs while a case is pending on appeal that makes it
6 impossible for the court to grant any effectual relief whatever
7 to a prevailing party, the appeal is moot and must be
8 dismissed.'" Id. That said, an appeal is not moot "if the
9 court can fashion some form of meaningful relief" for the
10 appellant in the event it decides the appeal on the merits in
11 its favor. Id.

12 It is well settled that the dismissal of a bankruptcy case
13 may render moot those matters closely connected with a Debtor's
14 reorganization, such as allowing a proof of claim. Bevan v.
15 Social Commc'ns Sites, LLC (In re Bevan), 327 F.3d 994, 997 (9th
16 Cir. 2003). Since only claimants with allowed claims may
17 participate in a distribution under a Debtor's plan, allowing
18 BNYM's POC is undoubtedly a matter closely connected with
19 Debtor's reorganization. Here, the dismissal occurred because
20 Debtor could not confirm a plan; no creditor, including BNYM or
21 SPS, will receive distributions since his case was dismissed.

22 Moreover, the deed of trust passed through Debtor's
23 bankruptcy and continues to encumber his Property. Upon
24 dismissal, the Property revested in Debtor and Debtor was
25 restored to all of the rights he possessed immediately prior to
26 the filing of his petition. See § 349. Indeed, Debtor
27 continues to pursue those rights in the Civil Action. Under

1 these circumstances, we fail to see how we could provide any
2 meaningful relief to Debtor within the confines of the
3 bankruptcy case itself. See In re Pattullo, 271 F.3d at 901-902
4 ("To have jurisdiction, we must be able to grant effective
5 relief within the boundaries of the present case.").

6 Generally, "a claims objection proceeding in bankruptcy
7 takes the place of the state court lawsuit or other action
8 because such actions are presumptively stayed by operation of
9 § 362." In re Veal, 450 B.R. at 918. However, the bankruptcy
10 court may defer to a nonbankruptcy court to liquidate and settle
11 the parties' claims and contentions under appropriate
12 circumstances. Here, the record shows that the bankruptcy court
13 implicitly abstained from making a merits ruling within the
14 context of the claim objection pertaining to issues that were
15 repeated in the Civil Action. Indeed, the parties continued to
16 litigate the standing issues and others in the Civil Action
17 prior to the bankruptcy court's ruling on the claim objection
18 and prior to the bankruptcy court's ruling on BNYM's motion for
19 relief from the stay. During the pendency of this appeal
20 Debtor's constitutional and prudential standing arguments
21 relating to BNYM and SPS ran their course in the Civil Action
22 along with his other arguments alleging violations under the
23 FDCPA and challenges to the validity of the assignment of the
24 deed of trust from MERS to BNYM. These claims, among others,
25 were dismissed with prejudice which means Debtor had no
26 opportunity to cure the pleading defects in his second amended
27 complaint. In addition, although the district court gave Debtor

1 one final opportunity to file a third amended complaint on the
2 quiet title cause of action, the district court made perfectly
3 clear in its dismissal order that Debtor could not re-plead his
4 "standing to enforce," "holder of the note," or UCC arguments
5 and allegations or any reformulation of them:

6 If Dodev submits a Third Amended Complaint that re-
7 pleads any claim dismissed with prejudice by this
8 order, rehashes his 'standing' arguments, or fails to
9 comply with [Civil] Rule 8, the Court will not wait
for a motion to dismiss to be filed, but will instead
strike the amended pleading and dismiss this action
entirely.

10 Given this background, a potentially preclusive order on
11 the standing issues has already been rendered. See Bevan,
12 327 F.3d at 997 ("The allowance . . . of 'a claim in bankruptcy
13 is binding and conclusive on all parties or their privies, and
14 being in the nature of a final judgment, furnishes a basis for a
15 plea of res judicata.'"). Accordingly, even if we were to
16 reverse the bankruptcy court's ruling that BNYM had standing,
17 the district court has already finally decided that issue.

18 **VI. CONCLUSION**

19 Because we can grant no effective relief, we DISMISS this
20 appeal as moot.
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